

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

v.

SAMUEL NUNEZ-NUNEZ,
Defendant.

No. CR-10-6007-FVS-1

ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS

THIS MATTER came before the Court on June 28, 2013, based upon Samuel Nunez-Nunez's motion to dismiss the superseding indictment. He was represented by Rick L. Hoffman. The United States was represented by Alexander C. Ekstrom. This order serves to memorialize the Court's oral ruling.

BACKGROUND

On June 15, 2010, a superseding indictment was filed charging Samuel Nunez-Nunez with the crime of possession of a false social security card. 42 U.S.C. § 408(a)(7)(C). An arrest warrant was issued the same day. Mr. Nunez-Nunez was living at 4012 Fernwood Lane, Pasco, Washington, when the superseding indictment was filed. He was arrested at that location on May 7, 2013. On June 6, 2013, he moved to dismiss the superseding indictment on the ground the United States' 34-month delay in arresting him violated his right to a speedy trial as guaranteed by the Sixth Amendment to the Constitution.

ANALYSIS

The Sixth Amendment provides, in part, that the accused in a criminal prosecution "shall enjoy the right to a speedy and public trial[.]" U.S. Const. amend. VI. The Supreme Court balances four factors when deciding whether a Sixth Amendment violation has occurred: "(1) whether delay before trial was uncommonly long, (2) whether the government or the defendant is more to blame for that delay, (3) whether, in due course, the defendant asserted his right to a speedy trial, and (4) whether he suffered prejudice as the delay's result." *Doggett v. United States*, 505 U.S. 647, 651, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992) (citing *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972)). The first factor to consider is the length of delay. Mr. Nunez-Nunez must establish that the delay which occurred in his case was long enough to establish a presumption of prejudice; otherwise, his speedy trial claim fails at the threshold. *United States v. Gregory*, 322 F.3d 1157, 1161 (9th Cir.2003). "[T]here is a general consensus among the courts of appeals that eight months constitutes the threshold minimum." *Id.* at 1162 n.3. The delay in this case -- 34 months -- easily exceeds the threshold. Mr. Nunez-Nunez has established a presumption of prejudice. It is appropriate, then, to examine the second, third, and fourth factors that are listed above.

The second factor to consider is responsibility for the delay. Mr. Nunez-Nunez alleges he was living openly at 4012 Fernwood Lane at all times relevant to this action. The United States does not dispute

1 his allegation. All the United States can say in response is that he
2 gave a former employer a different address. The United States may be
3 correct in that regard. The United States may have been faced with
4 contradictory addresses. In such situations, the United States has a
5 duty to determine whether either address is correct. Here, both
6 addresses were located within a matter of miles of each other. It
7 would not have difficult for the United States to investigate the 4012
8 Fernwood Lane address. The United States has not attempted to explain
9 why it failed to do so before May 7, 2013. Consequently, the United
10 States must bear sole responsibility for the 34-month delay.

11 The third factor to consider is whether Mr. Nunez-Nunez timely
12 asserted his right to speedy trial. *United States v. Mendoza*, 530
13 F.3d 758, 764 (9th Cir.2008). At this juncture, there is no
14 indication Mr. Nunez-Nunez knew, prior to his arrest, that he had been
15 charged with a federal crime. He was arrested on May 7, 2013. On
16 June 6th, he cited his Sixth Amendment right to a speedy trial and
17 moved to dismiss the superseding indictment. Clearly, he alleged a
18 speedy-trial violation in a timely manner.

19 The fourth factor to consider is whether Mr. Nunez-Nunez has
20 suffered actual prejudice. Three forms of actual prejudice can flow
21 from post-indictment delay: "(1)oppressive pretrial incarceration,
22 (2) anxiety and concern of the accused, and (3) the possibility that
23 the accused's defense will be impaired by dimming memories and loss of
24 exculpatory evidence." *Mendoza*, 530 F.3d at 764 (internal punctuation
25 and citation omitted). Here, it is the third of which Mr. Nunez-Nunez
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1 complains. He alleges a percipient witness of the events that give
2 rise to the superseding indictment, a Mr. Michael Smith, died on April
3 27, 2010. The United States does not dispute the fact of Mr. Smith's
4 death or the potential significance of his testimony. The Court is
5 mindful Mr. Smith died before the superseding indictment was filed.
6 Nevertheless, Mr. Nunez-Nunez might have been able to mitigate the
7 loss of Mr. Smith's testimony had he known during the Summer of 2010
8 that he was facing the instant charge.

9 **CONCLUSION**

10 The first three *Barker* factors -- length of delay, responsibility
11 for the delay, and prompt assertion of Sixth Amendment rights --
12 strongly support Mr. Nunez-Nunez's request for dismissal. The United
13 States waited over 34 months to arrest Mr. Nunez-Nunez. The United
14 States is almost solely responsible for the delay, and Mr. Nunez-Nunez
15 promptly asserted his Sixth Amendment rights after he was arrested.
16 That leaves the matter of actual prejudice. Mr. Nunez-Nunez cites the
17 death of Michael Smith. The United States does not deny Mr. Smith was
18 a percipient witness to events giving rise to the superseding
19 indictment. Had the United States arrested Mr. Nunez-Nunez during the
20 Summer of 2010, he might have been able mitigate the loss of Mr.
21 Smith's testimony. Admittedly, Mr. Nunez-Nunez's showing of actual
22 prejudice is somewhat speculative. However, the United States has not
23 attempted to demonstrate Mr. Nunez-Nunez presently has the means to
24 mitigate the loss of Mr. Smith's testimony. That being the case, the
25 Court concludes Mr. Nunez-Nunez has suffered actual prejudice as a
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1 result of the United States' 34-month delay in effecting his arrest
2 and his Sixth Amendment right to a speedy trial has been violated.

3 **IT IS HEREBY ORDERED:**

4 1. Mr. Nunez-Nunez's "Motion to Dismiss" (**ECF No. 34**) is **granted**.
5 The superseding indictment is dismissed with prejudice.

6 2. Mr. Nunez-Nunez's "Motion for Discovery" (**ECF No. 33**) is
7 **denied as moot**.

8 **IT IS SO ORDERED.** The District Court Executive is hereby
9 directed to file this order, enter judgment of dismissal, furnish
10 copies to counsel, and close this case.

11 **DATED** this 1st day of July, 2013.

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13 s/ Fred Van Sickle
14 Fred Van Sickle
15 Senior United States District Judge
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